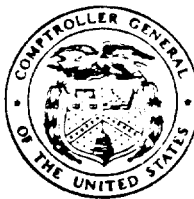


DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

23309

FILE: B-207777

DATE: January 7, 1983

MATTER OF: Canadian Commercial Corporation

DIGEST:

1. Canadian Commercial Corporation, a corporation of the Government of Canada, is required to submit an unequivocal endorsement of Canadian producer's bid.
2. Request for progress payments "in accordance with governing United States procurement regulations" does not render bid nonresponsive where there is nothing which indicates that the "request" was more than a mere wish or desire.

The Canadian Commercial Corporation (CCC) protests the rejection of a bid submitted by Canada Cordage, Inc., a Canadian producer, to the Defense Industrial Supply Center (DISC), Defense Logistics Agency (DLA), in response to invitation for bids (IFB) No. DLA500-82-B-2315.

CCC's endorsement of Canada Cordage's bid contained a request for progress payments which DLA construed as imposing a condition that rendered Canada Cordage's bid nonresponsive. CCC contends it did not condition the bid on the receipt of progress payments but merely requested that they be provided if they were available. CCC furthermore contends that its request cannot be construed as a condition because of CCC's status as an endorser of bids submitted by Canadian producers under Defense Acquisition Regulation (DAR) § 6-501 et seq. (Defense Acquisition Circular No. 76-25, October 31, 1980), which sets forth an agreement between the United States and Canada.

The protest is sustained.

CCC is wholly owned by the Government of Canada. It was established in 1946 in order to, among other things, assist in the development of trade between Canada and other nations. CCC provides a variety of services to the Department of Defense (DOD) and acts as the prime contractor on any bid endorsed by CCC or submitted through it to DOD and subcontracts 100 percent of the contract to the Canadian firm submitting the bid. See Baganoff Associates, Inc., 54 Comp. Gen. 44 (1974), 74-2 CPD 56.

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Canada Cordage's bid and CCC's endorsement were submitted in accordance with DAR § 6-504.1(b)(2) which provides:

"When a Canadian bid or proposal cannot be processed through the Canadian Commercial Corporation in time to meet the bid opening requirement, the Corporation is authorized to permit Canadian firms to submit bids or proposals directly, provided the Canadian bid or proposal and the Canadian Commercial Corporation endorsement are both received by the purchasing office prior to bid opening."
(Emphasis in original.)

See generally, Ronald Campbell Company, B-190773, April 17, 1978, 78-1 CPD 296; Canadian Commercial Corporation, B-185816, June 21, 1976, 76-1 CPD 396. CCC's endorsement was contained in the following telex to DLA:

"BID BY: CANADA CORDAGE INC KITCHENER, ONTARIO, CANADA IS HEREBY ENDORSED (DAR 6-504.1(B)(2)). DUTY NOT TO BE INCLUDED FOR EVALUATION (DAR 6-1403.1(C)(4)). DOUBLE ASTERISK PRIME CONTRACT WITH CDN COMMERCIAL CORPORATION, OTTAWA, ONTARIO K1A 0S6. (DAR 6-1406.1(A)). FOR INFORMATION: F ST GERMAIN A/C 819 944-3314 CCC FILE NO 70K3-82-B-2315(FS) REFERS. DOUBLE ASTERISK PROGRESS PAYMENTS, IN ACCORDANCE WITH GOVERNING US PROCUREMENT REGULATIONS, ARE REQUESTED."

The bid was rejected on the basis of DISC Master Solicitation, Clause L-19, "Progress Payments" (DISC 1970 FEB), which was incorporated by reference into the IFB. Clause L-19 implements DAR Appendix E § 504.5. The clause provides:

"PROGRESS PAYMENTS (DISC 1970 FEB)

"(a) Advertised Procurement: Unless specifically provided for in the Schedule of this Solicitation, progress payments will not be made in connection with this procurement and progress payment clauses will not be included in the contract at the time of award. Offers

conditioned upon provision for progress payments, when such payments are not authorized in the schedule of the Solicitation, will be rejected as nonresponsive." (Emphasis added.)

DLA construed CCC's request for progress payments as a condition of Canada Cordage's bid which rendered it nonresponsive.

Our Office has held that a bid conditioned on the receipt of progress payments where they are not allowed by the solicitation is nonresponsive in a material respect because it modifies the legal obligations of the parties concerning payments contrary to the express terms of the solicitation. 46 Comp. Gen. 368 (1966).

DLA relies on 46 Comp. Gen. 368 (1966), and 45 Comp. Gen. 809 (1966), for the rejection of the Canada Cordage bid. In 46 Comp. Gen. 368, the bidder included the following statement:

"In the event Lockheed Electronics Company is awarded a contract resulting from the subject IFB, it is requested that a suitable clause for progress payments be included therein."

In the 45 Comp. Gen. 809 case, the bidder included in the bid section entitled "Supplies or Services & Prices" the words "Progress Payments Are Requested." In both cases we held that the statements imposed conditions that rendered the bids nonresponsive. Both cases relied on B-154755, September 23, 1964, in which we stated:

"While we would agree that in the ordinary sense the word 'request' is precatory in nature, its precise meaning must depend upon the existing circumstances. * * * Since the invitation provided for a method of payment we think it not unreasonable to view your request as something more than a mere wish or desire. Had your bid been accepted it could have been argued that the Government accepted your request for progress payments and was bound to make payment in accordance therewith. If, as suggested, your request was in the nature of mere hope or wish and you intended to accept a

contract subject to the 'Payments' article, it was incumbent upon you to clearly express such intention. * * * It is a rule of long standing that where two possible meanings can be reached from the terms of a bid a bidder may not be permitted to explain what he intended since he would then be in a position to affect the responsiveness of his bid. * * *" (Emphasis added.)

CCC argues that the present case is more analogous to Potomac Iron Works, Inc., B-200075, January 8, 1981, 81-1 CPD 15, in which a bidder included the following advance payment request in its bid:

"Due to nature and supply of specified alloy, advance payment request in the amount of \$1,800 each to secure supply. Advance payment liquidated in 1 month or less. All in accordance with App. E of DAR. * * *" (Emphasis supplied.)

The procuring agency determined that the request conditioned the bid because it demonstrated that the protester could not secure supply without advance payment. We disagreed:

"In our view, Potomac's statement requesting advance payments 'to secure supply' in accordance with Appendix E of DAR can reasonably be interpreted only to mean that Potomac was 'requesting' advance payments and was not in any way conditioning or qualifying its bid. DAR E-407 permits bidders to request advance payments and there is nothing in Potomac's bid which indicates that it could not obtain the necessary materials in the absence of advance payments. Therefore the rejection of Potomac's bid as nonresponsive was improper and its protest is sustained. * * *"

CCC argues that the language contained in its request is virtually identical to the "in accordance with App. E of DAR" language approved in Potomac, and is actually clearer because it does not contain the accompanying "to secure supply" language.

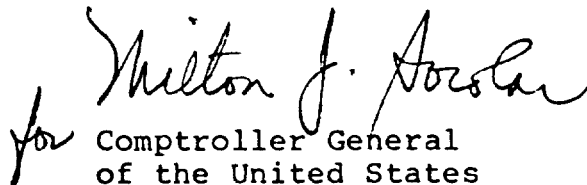
Our Office has held that the failure of CCC to submit, prior to bid opening, an endorsement of a bid submitted by a Canadian producer renders the bid nonresponsive. Ronald Campbell Company, supra; Canadian Commercial Corporation, supra. In our view, the endorsement must also be unequivocal. If the endorsement contains a condition that the endorsement is valid only if progress payments are to be paid, the bid is nonresponsive.

The word "request" is in the ordinary sense precatory in nature. B-154755, supra. CCC's request for progress payments therefore does not render Canada Cordage's bid nonresponsive unless the existing circumstances indicate that the "request" may have been something more than a mere wish or desire. Id. In our view, CCC's request "in accordance with governing U.S. regulations" can reasonably be interpreted only to mean that CCC was "requesting" progress payments and was not in any way conditioning its endorsement. Moreover, we agree with CCC that its request is even clearer than the request involved in Potomac because CCC's request did not contain the "to secure supply" language involved in Potomac. We conclude that CCC's endorsement did not render Canada Cordage's bid nonresponsive.

We recognize that the facts of this case are similar to 47 Comp. Gen. 496 (1968), 46 Comp. Gen. 368, supra, and 45 Comp. Gen. 809, supra, in which we reached a contrary conclusion. However, the rule applied in those cases, that is, whether the "request" is a condition or mere wish or desire, is identical to the rule applied in this case and Potomac. To the extent that our application of the rule in those cases may be inconsistent with our decision in this case, those cases should not be followed.

Because we have sustained the protest, we need not consider other issues raised by CCC.

The protest is sustained.


for Comptroller General
of the United States